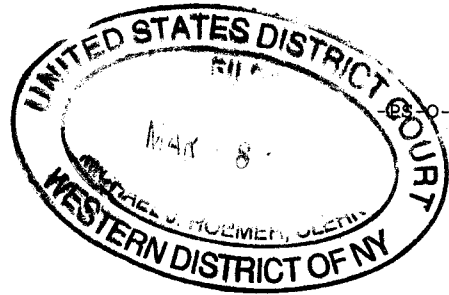


UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK



RUSSELL G. SMART,

Plaintiff,

-v-

ORDER

09-CV-0877S

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Plaintiff, Russell Smart, acting pro se, filed a complaint against the Commissioner of Social Security seeking what appeared to be the review of a decision upholding the denial of his application for Supplemental Security Income ("SSI") benefits, pursuant to § 205(g) of the Social Security Administration of the Social Security Act, 42 U.S.C. § 405(g). The Court granted his application to proceed *in forma pauperis* and directed him to file a copy of the "Right to Sue Notice from the Appeals Council (Docket No. 3), so the court could determine whether the action was premature and timely filed--i.e., filed within 60 days of receipt of a notice from the Social Security Administration's Appeals Council advising him that his request for review of the determination of the Administrative Law Judge denying him benefits had been affirmed. See 42 U.S.C. § 405.

Plaintiff filed a response to the Court's Order, stating, *inter alia*, that he had sent all the documents he had to the Court

and that the Social Security Administration has denied him benefits. (Docket No. 4). The Form Complaint filed by plaintiff states, in response to Question 5, that the Administrative Law Judge ("ALJ") issued a decision on his claim for benefits on October 31 ,2007. In response to Question 6, plaintiff claims that the Appeals Council affirmed the ALJ's decision on November 8, 2008. A letter from the Social Security Administration, dated December 30, 2008, which is attached to the complaint, notes however that plaintiff filed a new application for SSI benefits on July 28, 2006, which was denied but, after a request for a hearing and a review of plaintiff's file, an ALJ issued a decision without the need for a hearing on October 19, 2007, finding that plaintiff had been disabled since the date of plaintiff's new application on July 28, 2006. However, because plaintiff had an outstanding felony warrant in California he did not meet the "non-medical requirement" and thus the Social Security Administration issued a Notice of Disapproved Claim, dated October 31, 2007. Plaintiff was thus advised by letter dated November 4, 2008, that he was not currently eligible for SSI benefits. Plaintiff filed a request for review with the Appeals Council on November 8, 2008, which as of December 30, 2008--i.e., the date of the letter from the Social Security Administration attached to the complaint--was apparently still pending with the Appeals Council.

Because plaintiff is appearing *pro se* and claims that he has forwarded all the documents he has to the Court with the complaint, the Court finds that, at this time, the complaint should be served on defendant for an answer or other response. See, e.g., *Benitez v. Wolff*, 907 F.2d 1293, 1295 (2d Cir. 1990) (*per curiam*) ("Sua sponte dismissal of a *pro se* complaint prior to service of process is a draconian device, which is warranted only when the complaint lacks an arguable basis in law or fact. Where a colorable claim is made out, dismissal is improper prior to service of process and the defendants' answer.") (citations and internal quotations omitted)).

The Clerk of the Court is directed to cause the United States Marshal to serve copies of the Summons, Complaint, and this Order upon the named defendant at Office of Regional Chief Counsel, Region II, Social Security Administration, 26 Federal Plaza, Room 3904, New York, New York 10278-0004, without's payment therefor, unpaid fees to be recoverable if this action terminates by monetary award in's favor. Further, to ensure that there is no possibility of confusion with respect to service, it is hereby directed that, in addition to the U. S. Marshal service directed above, the Clerk of the Court is also directed to send copies of the Summons, Complaint, and this Order by certified mail to the following, pursuant to Rule 4(i) of the Federal Rules of Civil Procedure:

- Attorney General of the United States, Main Justice Building, 10th and Constitution Avenues N.W., Washington, DC 20530;

- Civil Process Clerk, United States Attorney for the Western District of New York, United States Attorney's Office, USAO/WDNY, 138 Delaware Avenue, Buffalo, New York 14202; and

SO ORDERED.

S/ MICHAEL A. TELESKA
MICHAEL A. TELESKA
United States District Judge

Dated: March 17, 2010
Rochester, New York